

**THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

LAWRENCE GEOFFREY ABRAHAM,
ALICE ZHANG, WAYNE TSENG, and
JAMAAL CARNEY, on behalf of themselves
and all others similarly situated,

Plaintiffs,

vs.

PEOPLECONNECT, INC., a Delaware
Corporation,

Defendant.

Case No.: 3:20-cv-09203-EMC

Judge Edward M. Chen

**DECLARATION OF CLIFFORD KUPPERBERG, CPA, IN SUPPORT OF
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

1 I, Clifford Kupperberg, CPA, hereby declare as follows:

2 1. I am writing in connection with my engagement on behalf of the Class in the above-
3 referenced litigation as an expert on damages. Please consider this declaration as my preliminary
4 report. As discovery is not yet complete in this matter, the opinions expressed herein are
5 preliminary and subject to change. I further reserve my right to revise the opinions expressed
6 herein in the event further research by me reveals revisions are necessary.

7 **Section 1: Qualifications and Experience**

8 2. I am a certified public accountant and a financial management consultant with more
9 than 50 years of experience in the field of accounting. I am the principal in Kupperberg &
10 Associates and have been retained as an expert consultant in this action. I have been qualified to
11 testify in various financial matters in multiple states and in both federal and state courts. A copy of
12 my current Curriculum Vitae is attached hereto as Exhibit A.

13 3. I am being compensated for my analysis and testimony in this litigation at the rate
14 of \$600 per hour, and my associates/staff at Kupperberg & Associates are being compensated at
15 various lower rates.

16 4. I have no publications within the past 10 years. The attached Curriculum Vitae lists
17 the trials and depositions in which I have testified as an expert.

18 **Section 2: Data and information considered**

19 5. In submitting this declaration, I have considered the following data and
20 information:

- 21 • Complaint dated December 18, 2020
- 22 • Order Denying Defendant's Motion to Stay Pending Appeal; Granting in Part and
23 Denying in Part Defendant's Motion to Dismiss and Strike; and Denying
24 Defendant's Motion to Stay Discovery. Dated November 1, 2021.
- 25 • Plaintiffs First Set of Requests for Production of Documents, Dated 4/13/2022
- 26 • Plaintiffs Second Set of Request for Production of Documents, Dated 5/24/2022
- 27 Plaintiffs First Set of Interrogatories to Defendant, Dated 4/13/2022

- Plaintiffs Second Set of Interrogatories to Defendant, Dated 5/24/2022
- Defendant PeopleConnect's Supplemental Responses to Plaintiffs' First Set of Interrogatories Dated July 15, 2022
- Defendant PeopleConnect's Second Supplemental Responses to Plaintiffs' First set of Interrogatories Dated July 26, 2022
- [REDACTED] PCI_CALLAHAN 0000449-457
- [REDACTED] PCI_CALLAHAN 0000436-448
- Declaration of Clint Smith, Director of Strategic Partnerships at PeopleConnect, dated July 26, 2021.
- [REDACTED] PCI_CALLAHAN 0000431-435
- [REDACTED] PC_CALLAHAN_0007640-7643.
- [REDACTED] PC_CALLAHAN_0000458-63.
- Screenshot of Classmates.com website, at "Yearbooks Home / Submit Yearbook." PCI_CALLAHAN_0001215.
- California Department of Education Data and Statistics Related to Statewide Enrollment by Grade for various years from 1948 for Public and Private Schools
- National Center for Education Statistics – Digest of Education Statistics Table 105-30
- U.S. Department of Education – 120 Years of American Education: A Statistical Portrait
- Mortality tables and various studies relating to number and ages of people alive in 2018.
- Redwood High School Yearbook for the school year ending in 1959.
- Classmates.com website information and various direct emails.

Section 3: Scope, Opinions and Analysis

6. In performing my analysis, I assumed that the pleadings are correct and that the acts claimed are the proximate cause of damage to plaintiff. In discussing the question of damages, I do not mean to express any opinion as to the validity of the claims.

7. Counsel have asked me to provide a declaration addressing two issues:

I. Estimated size of the Class

II. Methods of measuring damage on a Class-wide basis

I. Estimated size of the Class

8. Counsel have asked me to assume the following Class definition:

All persons residing in the State of California who are not registered users of Classmates.com and whose names and yearbook photographs were searchable on the Classmates.com website at any time between December 18, 2018, and the present.

9. My preliminary estimate is based upon research and the discovery presently available in this case. I reserve the right to adjust or amend these amounts based upon later discovery or the results of additional ongoing research.

10. I estimate the size of the Class to be between five and six million members.

11. **Methodology:** I started with the number of California yearbooks in PeopleConnect's database. According to PeopleConnect there are [REDACTED] California yearbooks in its database.

12. PeopleConnect provided a PDF (PCI_CALLAHAN_0000473-1208) which was a listing of California yearbooks and when they were added to the Classmates website. I converted the PDF to an EXCEL spreadsheet and added the detail. The spreadsheet contained [REDACTED] line items.

13. Counsel informed me they have requested PeopleConnect provide the number of individuals and/or the number of photographs contained in the yearbooks in California, but PeopleConnect has claimed it cannot provide this information. If PeopleConnect provides this information, I will update my estimate.

1 14. To estimate the number of individuals represented in each yearbook I estimate the
2 number of seniors in each yearbook. This avoids double-counting students who appear in multiple
3 yearbooks as they progress through high school.

4 15. Using data obtained from the California Department of Education the average
5 number of high school seniors in California has been approximately 515,000 over the past twenty
6 years.

7 16. The number has increased between 1950 and today. In 1950 the number of high
8 school seniors in California was 73,175. I have requested additional information from the
9 California Department of Education years from 1950 through 1995 as well as other data which, if
10 received I will use to update my calculations. I am using data obtained from separate websites of
11 the U.S. Department of Education and National Center for Education Statistics which show the
12 changes in total enrollment for secondary schools and will apply the percentage of seniors to the
13 total enrollment to obtain the average over the missing periods if appropriate.

14 17. For my preliminary estimate I took the number of seniors over the last ten years for
15 public schools and divided by the total number of schools to estimate the average number of
16 seniors in each school yearbook. The calculation resulted in my estimate of 368 seniors per school,
17 therefore per yearbook. The number of yearbooks is then multiplied by the average number of
18 seniors.

19 18. I then considered additional factors that would cause the calculated amount to be
20 over or understated. They included the number of seniors who would have passed away and those
21 who would have moved out of or into California.

22 19. Based upon data obtained from the Department of Census and the Department of
23 Vital Statistics I was able to determine the percentage of seniors still living who were born in each
24 year included in the calculations. I apply the percentage by year to the estimated number of
25 seniors.

20. Based upon available general information on migration into and out of California during the period, I determined that the net effect would have been positive and therefore made no adjustment as part of my conservative approach to all of these determinations.

21. Finally, I subtract the number of registered users in California who also appear in yearbook photographs on Classmates.com.

22. Because PeopleConnect does not collect addresses from non-paying registered users, I do not know the actual number of registered Classmates.com users who reside in California, nor do I know how many registered Classmates.com users appear in yearbook photographs on the Classmates.com website.

23. At this time, I have used my high school yearbook as a surrogate for the average percentage of high school seniors who are listed as registered users of Classmates.com. In the latest view of that yearbook, 33 seniors were listed as registered users out of 133 total. This represents 23.2% of the seniors in that yearbook. I will adjust to the above calculation when I receive additional data. I am using 25% in my preliminary calculation.

24. The total yearbooks () times the number of seniors per yearbook (368) less 25% that are estimated to be no longer living equals 6.9 million individuals. Taking 25% off for registered users leaves 5.2 million as my present estimate of the size of the proposed Class.

25. The period of damage continues and the number of yearbooks, mortality of Class members as well as the number of Classmates users will likely change. As additional information becomes available, I will include it in my calculations.

II. Methods for calculating class-wide damages

26. The following is a description of the methods by which class damages could be calculated for each of Plaintiff's claims. I reserve the right to modify or devise new methods based upon future discovery or additional analysis of the facts available.

Claim one: Statutory Right of Publicity. Cal. Civ. §3344

27. Counsel have asked me to assume they will be pursuing statutory damages in the amount of \$750 per Class member. Based upon my understanding of Judge Chen's order in this

case, signed 11/1/2021, a Class member is entitled to statutory damages so long as he/she has suffered “actual damage” in some amount. Counsel have informed me, and the Judge’s order indicates, that Class members suffered “actual economic injury” because of PeopleConnect’s failure to compensate them for its commercial use of their names and photographs.

28. The amount of actual damage the Class members suffered as a result of PeopleConnect’s failure to compensate them for its commercial use of their names and likenesses may be measured by at least three methods. I summarize these three methods below.

29. Counsel have also asked me to assume that, although they intend to pursue statutory damages, they also intend to prove PeopleConnect’s “unauthorized profits” from its use of Class members’ photographs. Counsel have informed me that under Cal. Civ. Code § 3344, it is Plaintiffs’ burden only to prove PeopleConnect’s revenue from the unauthorized use, while it is PeopleConnect’s burden to prove any relevant costs. In addition to being one of three methods by which entitlement to statutory damages may be established, the third method summarized below is also a reasonable measure of the unauthorized profits PeopleConnect earned from its use of the Class members’ photographs.

30. **Method one:** [REDACTED]

31. [REDACTED]

[REDACTED] Documents PCI_CALLAHAN_0000432-457 [REDACTED]

1 [REDACTED]
2 PCI_CALLAHAN_0000438. [REDACTED]

3 [REDACTED] *See, e.g.,* PCI_CALLAHAN_0000432 [REDACTED]
4 [REDACTED]

5 32. [REDACTED]

6 [REDACTED] For example, PCI_CALLAHAN_0000458-460 [REDACTED]
7 [REDACTED]

8 [REDACTED] As another example, PCI_CALLAHAN_0007640 to
9 PCI_CALLAHAN_0007643 [REDACTED]

10 [REDACTED] As another example, PCI_CALLAHAN_0001215 is a
11 webpage on the classmates.com website indicating that if a user sends in a copy of a yearbook,
12 Classmates will provide in exchange three months of free access to its subscription service. That
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]

16 33. **Method two:** I have reviewed the declaration of Clint Smith, dated July 26, 2021,

17 34. which states that PeopleConnect has a licensing agreement with Ancestry.com
18 under which PeopleConnect provides its yearbook database to Ancestry.com. Counsel inform me
19 that Ancestry.com uses the Class members' likenesses to advertise website subscriptions in a
20 similar manner to that of PeopleConnect. [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26
27

35. [REDACTED] (PCI_CALLAHAN 0001221-1259) [REDACTED]

36. **Method Three:** PeopleConnect receives subscription revenue after presenting advertisements as shown in the Complaint. A portion of PeopleConnect's subscription revenue is attributable to subscriptions that users purchased after viewing advertisements that incorporated Class members' photos.

37. Recent discovery from PeopleConnect (Supplemental Response to Interrogatory 4)

[REDACTED] Deposition testimony of Clint Smith, taken on August 2, 2022, [REDACTED]

38. Based on this calculation, the amount PeopleConnect's subscription revenue between 2019 and 2021 attributable to PeopleConnect's commercial use of Class members' photographs was approximately [REDACTED]. This is a reasonable measure of PeopleConnect's revenue earned from its unauthorized use of Class members' names and likenesses through 2021.

Claim two: Unfair Competition Law (UCL)

39. Counsel have informed me that a monetary claim for UCL is restitutionary in nature, *i. e.*, the monetary recovery is intended to place the Class members in the situation they would have been had the illegal conduct not occurred.

40. Here, Plaintiffs allege PeopleConnect is liable because it failed to obtain their consent prior to using their names and photographs to advertise PeopleConnect's subscription products, as required by California law.

41. Counsel instructed me that, in order to restore Class members to the position they would have been in had PeopleConnect respected its obligations under the law, it is reasonable to assume that PeopleConnect should have paid each Class member a royalty in exchange for the commercial use of her name and likeness.

42. To calculate the amount PeopleConnect should have paid in royalties to Class members, I intend to take into consideration [REDACTED]

Claim three: unjust enrichment

43. Counsel inform me that a claim for monetary relief under a theory of unjust enrichment aims to make the defendant disgorge the gains obtained as a result of the illegal conduct.

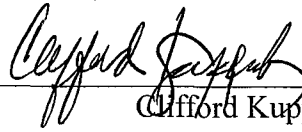
44. To calculate the amount PeopleConnect owe in disgorgement under the unjust enrichment claim, I intend to use the same method described above ("Method Three") as well as [REDACTED] ("Method Two") for calculating PeopleConnect's profits from its unauthorized use.

45. All these calculations are dependent upon receiving additional data from Defendant. Should the data received allow more reliable methodology I will amend this report accordingly.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct, and that this declaration was executed in SAN MATEO, California.

August 4, 2022

Date



Clifford Kupperberg, CPA

CERTIFICATE OF SERVICE

I, Raina C. Borrelli, hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to counsel of record via the ECF system.

DATED this 5th day of August, 2022.

By: /s/ Raina C. Borrelli
Raina Borrelli (*pro hac vice*)
raina@turkestrauss.com
TURKE & STRAUSS LLP
613 Williamson St., Suite 201
Madison, Wisconsin 53703-3515
Telephone: (608) 237-1775
Facsimile: (608) 509-4423